BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THANH V. TA	)	
Claimant	)	
VS.	)	
	)	Docket No. 166,011
THE BOEING CO. - WICHITA	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY	)	
Insurance Carrier	)	

ORDER

ON the 17th day of March, 1994, the applications of the respondent and claimant for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated February 15, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Phillip R. Fields of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of Special Administrative Law Judge William F. Morrissey, dated February 15, 1994, is hereby adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of Special Administrative Law Judge William F. Morrissey, dated February 15, 1994, are herein adopted by the Appeals Board.

ISSUES

Both the respondent and the claimant have requested the Appeals Board to review Special Administrative Law Judge William F. Morrissey's Award on the sole issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record, the stipulation of the parties, and the arguments of counsel, the Appeals Board finds, for the reasons set forth below, that the claimant sustained a work-related accidental injury while employed by the respondent on April 24, 1991. Due to the residual effects of this injury, the claimant has suffered a permanent partial general disability in the amount of forty-eight percent (48%) based upon work disability.

Claimant is a native of Vietnam, having immigrated to the United States in 1981. He was born on November 20, 1942, and completed a college degree in general education from a university in Vietnam. He served in the Vietnamese Army from 1963 through 1975, with a final rank of Liaison Officer in the artillery. Since being in the United States, the claimant has completed twenty-nine (29) hours in electronics and English at Johnson County Community College, has received industrial educational certificates in digital electronics and MIG and TIG welding. His prior work experience in the United States consists of electronic assembly at King Radio in Olathe, Kansas; assembly line worker at Tyson Foods in Neosho, Missouri; and, a machinist at Southwestern Engineering in Joplin, Missouri.

In April 1989, claimant commenced working for the respondent as a Skin Mill Operator B. On the date of his accident, April 24, 1991, he was working as a Bench Mechanic Sheet Metal B. Claimant was injured when an aluminum alloy airplane skin, measuring six feet by eight feet (6'x8') and weighing about fifty (50) pounds, hit a big box which knocked the claimant off balance and caused him to fall and land on his back, back of his head, and finally striking his arm on the concrete floor. After the accident, the claimant was sent for treatment to Boeing Central Medical. He was told he would feel better after he took a few days off work. However, he did not improve as his back became more symptomatic. Conservative medical treatment was provided by the respondent through Dr. Paul Lesko and Dr. William Shapiro, both orthopedic surgeons.

Dr. Shapiro finally referred claimant to Dr. Lawrence Blaty, board-certified in physical and rehabilitation medicine, on October 29, 1991, for evaluation and treatment using physiatric means of rehabilitation. After taking a history and examining the claimant, along with reviewing previous medical records including Dr. Shapiro's, Dr. Blaty's diagnosis was acute low back syndrome with right lower extremity sciatica. He prescribed a course of physical therapy, use of a TENS unit for pain, Cybex Isokinetic Evaluation and medication. Dr. Blaty had the claimant undergo a Cybex Isokinetic test on November 5, 1991, and a functional capacity evaluation on February 17, 1992. Dr. Blaty last saw the claimant on February 21, 1992. In a letter dated February 21, 1992, to Dr. Shapiro, Dr. Blaty opined that the regimen of physical therapy had benefitted the claimant but he still had persistent low back pain. Dr. Blaty indicated that the claimant would not benefit from any further conservative treatment. Therefore, Dr. Blaty released the claimant with the following permanent restrictions based primarily on the functional capacity evaluation: 1) Sitting is limited to five (5) hours per day at thirty-minute (30) intervals; 2) standing is limited to two (2) hours and walking is limited to two (2) hours per day at twenty-minute (20) intervals; 3) occasional bending of less than five (5) times per hour; 4) occasional squatting of less than ten (10) times per hour; 5) no crawling, no frequent stair climbing or overhead

reaching; 6) no lifting over twenty-five (25) pounds, eleven to twenty-four (11-24) pounds infrequently, and ten (10) pounds frequently; and, 7) no activities at unprotected heights. Dr. Blaty instructed the claimant to continue to use the TENS unit to help modulate the pain. Claimant is functioning in the sedentary to light physical demand level. The claimant's sheet metal mechanic's job that he was performing at the time of the date of his accident is in the medium to heavy physical demand level. Dr. Blaty concludes that the claimant could not perform these job duties because he can only function in the sedentary to light demand level categories. In regard to permanent functional impairment, Dr. Blaty utilized the American Medical Association's Guides to Permanent Impairment in conjunction with the findings of other treating physicians, the functional capacity evaluation, his experience and best medical knowledge in arriving at a nine percent (9%) permanent functional impairment rating.

The claimant, at the request of the respondent's insurance carrier, was referred to Stephen Ozanne, M.D., an orthopedic surgeon in Wichita, Kansas, for a second opinion on January 27, 1992. At the time of Dr. Ozanne's examination, he had the benefit of a previous CT scan of the claimant's lumbar spine. This CT scan showed a calcified disc herniation with degenerative changes at the L4-5 level. Disc narrowing between L4-5 and some backward shifting at L4-5 were also found. After taking a history from the claimant and performing a physical examination, Dr. Ozanne concluded that the claimant's back pain and right leg symptoms were consistent with the disc herniation and degenerative changes found at the L4-5 level. Dr. Ozanne opined that the fall, as described by the claimant, when he was working for the respondent aggravated his pre-existing condition and resulted in his present symptoms and complaints. Dr. Ozanne opined that further non-surgical treatment would not benefit the claimant. Consequently, he recommended that the claimant consider undergoing a surgical procedure of decompression and fusion of the lumbar spine at L4-5.

The claimant returned to see Dr. Ozanne on March 13, 1992. At this time surgery was again discussed and the claimant notified the doctor that he did not wish to undergo the recommended surgery. Claimant had returned to work prior to this visit but had been unable to tolerate the work because of his back condition.

Since the claimant had made the decision not to undergo surgery, Dr. Ozanne, in an April 6, 1992 letter to the respondent's insurance carrier, permanently restricted the claimant to functioning at a light physical demand level, limiting lifting to fifteen (15) pounds infrequently and ten (10) pounds frequently. He should be allowed to change positions between sitting and standing as needed. Bending and twisting were limited to occasional or no more than ten (10) times per hour. In accordance with the American Medical Association's Guides to Permanent Impairment, Third Edition, Revised, Dr. Ozanne concluded that as a result of claimant's work-related back condition, the claimant's functional permanent impairment is ten percent (10%) of the whole person. If surgery would have been performed as recommended, the claimant's functional impairment would have been similar. In fact, allowing for the surgical fusion, the permanent impairment might have increased by two (2) percentage points. Dr. Ozanne followed the claimant until his last visit of January 20, 1992, however, these subsequent visits concerned the claimant's right wrist complaints which satisfactorily resolved with no permanent restriction.

In the present case, the respondent takes the position that following his injury the claimant was offered by the respondent an accommodated job at a comparable wage that he was physically capable of performing within his physician's imposed restrictions. The

claimant returned to work for the respondent in February 1992 at what the respondent characterizes an accommodated job. The claimant testifies that he worked twenty to thirty (20-30) minutes on this job and then notified his supervisor that he could not perform the job duties because of his injuries. Respondent then terminated the claimant because he declined to perform the accommodated job. Accordingly, the respondent argues that the presumption of no work disability applies and the claimant is limited to an award of permanent partial general disability based upon functional impairment only. See K.S.A. 1990 Supp. 44-510e(a). After a careful review of the record, the Appeals Board disagrees with the respondent's position, as the credible evidence establishes that the so-called accommodated job offered the claimant was clearly outside the permanent restrictions placed on the claimant by the physicians. Even in the short attempt that the claimant made to perform the job duties, he physically was unable to complete those duties. Claimant testified that he did return to work in February 1992, but could not do the job because it was too heavy. Claimant was not provided a stool to sit on to perform the job requirements and even if he were provided a stool he testified that he could not have completed the job on the stool. After twenty or thirty minutes on the job, he had to sit down and at that time the supervisor told claimant to go on sick leave or vacation and to go home. A video tape, representing the accommodated job respondent allegedly provided the claimant an opportunity to perform, was placed into evidence by the respondent. The Appeals Board has reviewed this video tape evidence and agrees with the Special Administrative Law Judge's finding that the video tape depicts a job requiring a worker to be on his feet all of the time and working primarily in a bent over position. These job requirements are beyond the permanent restrictions placed on the claimant by both Dr. Blaty and Dr. Ozanne. Accordingly, it is the finding of the Appeals Board that the presumption of no work disability does not apply in this case as credible evidence established that the claimant was unable to engage in work at a comparable wage following his injury.

As work disability is an appropriate issue to be addressed in this case, the record contains work disability evidence presented by Jerry Hardin, human resource consultant, testifying on behalf of the claimant, and Karen C. Terrill, M.S., rehabilitation consultant, testifying on behalf of the respondent. With respect to the issue as to loss of claimant's ability to perform work in the open labor market, Mr. Hardin's personal opinion, based on Dr. Blaty's and Dr. Ozanne's permanent restrictions, ranges from sixty to seventy percent (60-70%). Ms. Terrill accepted the Labor Market Access Plus computer program results, which utilized both Dr. Blaty's and Dr. Ozanne's permanent restrictions, as her opinion on loss of labor market of forty-three percent (43%).

In regard to loss of claimant's ability to earn comparable wages, Mr. Hardin found that the claimant had the ability to earn post-injury $300.00 per week. The parties stipulated to a pre-injury weekly wage of $715.09 and comparing this to the post-injury weekly wage of $300.00, the reduction amounts to fifty-eight percent (58%). Ms. Terrill concluded that claimant's ability to earn comparable wages had not been reduced because the claimant's retained transferrable skills gave him the capacity to work at several jobs at a comparable wage. However, Ms. Terrill, in arriving at this conclusion, used a pre-injury average weekly wage of $536.80 instead of the pre-injury stipulated wage of $715.09. If the claimant's pre-injury stipulated weekly wage of $715.09 is compared to the $536.80 weekly wage Ms. Terrill has indicated the claimant has the ability to earn post-injury, the result is that the claimant has a twenty-five percent (25%) reduction in his ability to earn a comparable wage. See Slack v. Thies Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310, rev. denied 239 Kan. 694 (1986).

The Special Administrative Law Judge found the claimant was entitled to a work disability in the amount of forty percent (40%) giving equal weight to a fifty-five percent (55%) reduction in the claimant's ability to perform work in the open labor market and a twenty-five percent (25%) reduction in his ability to earn comparable wages. The Appeals Board, after careful review of the testimony of both vocational rehabilitation experts, finds no persuasive reason not to consider Mr. Hardin's averaged opinion of sixty-five percent (65%) for loss of labor market with Ms. Terrill's forty-three percent (43%) loss of labor market, resulting in a fifty-four percent (54%) reduction in labor market loss. The loss of comparable wage factor should be arrived at by averaging Mr. Hardin's fifty-eight percent (58%) opinion with twenty-five percent (25%) which was arrived at by comparing the stipulated pre-injury wage of $715.09 with $536.80 for a post-injury wage. This would result in a loss of comparable wage for the claimant in the amount of forty-one and one-half percent (41.5%). The Appeals Board finds that it is appropriate in this case that both factors be given equal weight, entitling the claimant to a forty-eight percent (48%) permanent partial general disability based upon work disability. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990).

Nature and extent of claimant's disability was the only issue for review by the Appeals Board. Therefore, all other findings made by Special Administrative Law Judge William F. Morrissey, in his Award of February 15, 1994, are incorporated herein and made a part hereof as if specifically set forth in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 15, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Thanh V. Ta, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury sustained on April 24, 1991, and based upon an average weekly wage of $715.09.

Claimant is entitled to 78 weeks of temporary total disability compensation at the rate of $278.00 per week or $21,684.00, followed by payment of $228.84 per week for 337 weeks or $77,119.08, for a forty-eight percent (48%) permanent partial general disability, making a total award of $98,803.08.

As of September 28, 1994, there is due and owing the claimant 78 weeks of temporary total disability compensation at the rate of $278.00 per week or $21,684.00, plus 101.14 weeks permanent partial disability compensation at $228.84 per week in the sum of $23,144.88 for a total due and owing of $44,828.88, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $53,974.20 shall be paid at $228.84 per week for 235.86 weeks until fully paid or further order of the Director of Workers Compensation.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip R. Fields, 106 W. Douglas, 502 1st National Bank, Wichita, KS 67202
Frederick L. Haag, 700 Fourth Financial Center, Wichita, KS 67202
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director